

In the United States  
**Circuit Court of Appeals**  
For the Ninth Circuit

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TOM RUSTAD, Owner and Claimant of the Oil  
Screw "MELODY" and FIDELITY & DE-  
POSIT COMPANY OF MARYLAND, a  
corporation,

*Appellants,*

vs.

CHARLES WUORI, JOHN KURTTI, CYRUS  
C. CHRISTENSEN and ARMAND SYVAN-  
EN,

*Appellees.*

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**BRIEF ON BEHALF OF APPELLANTS**

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Upon Appeal from the District Court of the United  
States for the District of Oregon.

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**JURISDICTION**

This was a libel in admiralty in the District Court.  
The appeal is from the decree there entered; consequent-  
ly the jurisdiction of this Court is clear.

**STATEMENT**

The MELODY, a tuna fishing boat, capsized and  
was found by the libelants in their fishing boat, the

STAMPEDE II, "approximately" 9<sup>1</sup> miles off North Head, at the mouth of the Columbia River, on July 24, 1945. The MELODY was partially submerged, was heavily listing to starboard and only parts of her were visible above the water. Respondent Rustad was her owner, and he and the four men who, with himself, made up the crew, had taken to a rubber liferaft when she capsized, and had become separated from her by about a mile or two on account of wind and tide, but had not abandoned her, and had every intention of returning to her with the Coast Guard. The MELODY capsized at ten minutes to 1:00 P.M. (R. 205), and the STAMPEDE II came alongside about 2:30 P.M. (R. 55, 56). The weather was fine, the sea smooth. Libelant Wuori admits "There wasn't hardly any wind at all—very little wind. After 30 years of time I have been at sea I saw that much fine weather as there was. Seldom you see it, maybe once in 5 or 10 years, such nice weather as that particular weather when we found it first". R. 55. The tide was half ebb (R. 54) and there was an easy ground swell. (R. 55.) The STAMPEDE II nosed up to the MELODY and Syvanen, one of her crew, jumped aboard the MELODY and placed a line around her rud-

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(NOTE 1) The Findings of Fact, (R. 21), copying verbatim the words of the libel (R. 3) say she was "approximately" 9 miles north of the Columbia River and 9 miles West or offshore from the Washington Coast. This is admittedly only an approximation, and the testimony varies in regard to it. Libelant Wuori is particularly vague. At one place he says he was "perhaps six or seven miles offshore" when he sighted the MELODY, R. 52; and he must have been close to her then, for Syvanen who, with Kurtii, actually did the sighting (Wuori was then asleep, R. 125) said she was only a quarter of a mile away. R. 135. At another place Wuori says the MELODY was approximately 10 miles off North Head, R. 61; and so marked her on the Chart, Libelant's Ex. 1. Coast Guardsman Jensen said that when he arrived at 5:15, R. 257, the MELODY and STAMPEDE were about 7 miles, 279 degrees true, off North Head. (This was after the STAMPEDE had been towing since 4 o'clock.) Coast Guardsman Shaw confirms this. R. 286.

der stock. He did this by getting into the open cockpit on the port side, and, without ducking his head under water, "jockeyed" the line around the rudder stock with his foot. R. 127-128. Wuori radioed the Coast Guard Stations ashore and they dispatched a lifeboat from the Cape Disappointment Station, another from the Point Adams Station, and the larger tug and lighthouse tender, TRIUMPH, which was coming in from another errand. *Prior* to the Coast Guard's receipt of that notice, however, some Navy patrol planes had spotted Rustad and his crew on the rubber life raft and had radiod that news to the Coast Guard Stations, and the "crash boat" from the Point Adams Station immediately put out to rescue the men. She left her station at 2:57 P.M., arrived at the lifeboat at 3:27, and picking up the men, went on to the STAMPEDE and MELODY, a mile or two away, arriving there at 3:40. R. 330. Seeing the situation there, the crash boat then radioed the Coast Guard Stations ashore to send out help to tow, and was informed that such help was already on the way in response to Wuori's radio. R. 331-332.

Rustad and a Coast Guardsman used the rubber life raft to transfer Syvanen from the MELODY back to the STAMPEDE II, and then, sensing that Wuori did not welcome his interference, and the crash boat being unequipped for towing, and the other boats from the Coast Guard being on their way out, Rustad and his men, in the crash boat, left for Astoria, passing the outcoming boats on the way in. The crash boat had remained in the vicinity of the MELODY and STAMPEDE about an hour. R. 330.



The Coast Guard lifeboat from Point Adams, responding "*immediately*" to the radio call of the STAMPEDE, had left that station at about 3:20. R. 257. Which shows that Wuori's radio was *subsequent* to that of the navy patrol planes by *nearly half an hour*, since the patrol planes radioed in at 2:56. R. 329. The Point Adams lifeboat arrived alongside the STAMPEDE at 5:15. R. 257. The Cape Disappointment lifeboat arrived at the scene about 15, and the TRIUMPH about 30 to 45, minutes later (R. 262), so that all three of these boats arrived within half to three-quarters of an hour of each other. R. 262. Shaw, Commander of the TRIUMPH, who kept notes, says she arrived at 5:50 P.M., which corresponds with the foregoing.

The Point Adams boat and the TRIUMPH, both without any difficulty, put lines aboard the MELODY. The Cape Disappointment boat stood by. Up to this time the STAMPEDE II had only succeeded in towing the MELODY less than two miles, and it had taken her nearly two hours. They were still in the open ocean.

We base the estimate of less than two miles on a composite of the following evidence: The time, which was less than two hours; the Finding that the MELODY was, at first, about 9 miles offshore, and the testimony of Jensen that when he arrived, she was about 7 miles off North Head, R. 258; confirmed by Shaw, R. 286; the fact that the STAMPEDE's tow-line had parted, necessitating delays, R. 261, 287; the fact that the MELODY was almost submerged, making a heavy tow, and that the STAMPEDE had only 100 horsepower; the testimony of Shaw that, with both Coast Guard boats tow-



ing, and aided part of the time by the STAMPEDE, and a flood tide, the speed was only about  $2\frac{1}{2}$  miles per hour, R. 308-309; and his testimony that when the STAMPEDE was towing alone, she made "very little progress," R. 307.

Of course after the Coast Guard boats took hold, the speed of the towing increased, and, as they entered the river, was aided by the tide flooding. All three towing boats were in front and spread out a little fanwise,—the TRIUMPH on the starboard, the STAMPEDE in the middle, and the Point Adams boat on the port side. As they entered the river, the STAMPEDE wanted to shorten her cable, and in doing so her propeller fouled the towline of the TRIUMPH. This was at 10:45 P.M. according to Shaw's notebook. R. 298. There is some dispute as to exactly how this occurred and whose fault it was. They then cut the TRIUMPH's line both in front of and behind the STAMPEDE, and leaving the cut segment in the STAMPEDE's propeller, fastened the two cut ends together and proceeded with the towing, the TRIUMPH and the Point Adams boat from that time on doing all the towing alone, and the STAMPEDE taking no part, but, on the contrary, being herself towed in by the Cape Disappointment Coast Guard boat. They arrived at the Point Adams Station at a half hour after midnight. R. 269, 308. The place where the STAMPEDE fouled the line was 700 or 800 yards, 120 degrees true, from No. 5A channel buoy, according to Jensen. R. 264. This is 7 miles from the Point Adams Station, as measured along the courses, on the Chart, Libelants' Ex. 2. So that the distance which the two Coast Guard

boats towed the MELODY entirely alone, without the STAMPEDE was 7 miles.

Arriving at the Point Adams Station, they beached the MELODY, and at low tide next morning, about 6 o'clock, the Coast Guard men, with their pump and equipment, pumped her out, the STAMPEDE crew standing by. R. 270-271, 283.

This completed the salvage. The Coast Guard, at Rustad's request, towed the MELODY to Astoria. R. 246, and Rustad himself disposed of his fish. R. 216.

The MELODY was towed to Portland for repairs. Her engines were found to be quite badly damaged by the sudden impact of the cold sea water against the hot metal. She cost, when new that spring, \$20,000. R. 204. Her repairs and incidental expense cost \$7527.24. R. 191-192. The difference between \$20,000 and \$7500 would make the net salved value \$12,500, but this apparently would not have included tackle, bait tanks, paraphernalia and fishing gear, so the Court evidently added \$5,000 for good measure. At any rate, he valued the boat, including all paraphernalia and gear, etc., at \$17,500. R. 27. He arrived at a salvage award by estimating the total value of the services, *including* those of the Coast Guard, at \$6,000 (R. 27), and apportioned two-thirds of that, or \$4,000, to the libelants, and added \$300 for loss of their equipment, so that the total amount of the salvage award was \$4300. R. 29.

## **SPECIFICATION OF ASSIGNED ERRORS RELIED ON BY APPELLANTS**

Appellants rely on Assignments of Error 1 to 10, inclusive, appearing at R. 32-34, and printed as an appendix to this brief. These Assignments are in essence that the services performed were not salvage of a high order, since they contributed little to the ultimate success and there was little danger either to the salvaged property or to the salvors; and, considering the value of the salvaged property, \$17,500, the award was too high. Since the Assignments of Error all go to the foregoing alleged general error of the Trial Court, we ask that we may be permitted to discuss them generally under one head, instead of splitting the argument too much between them. We believe such course will benefit the Court.

## **ARGUMENT**

The principles of salvage are, of course, well known. They are: (1) Danger to the property salvaged; in determining which nearness of other aid (Coast Guard) must be considered; (2) danger to the salvors and their property; (3) difficulties encountered and skill shown in overcoming them; (4) net value of the property salvaged.

We shall discuss these in their order:

### **Danger to the Property Salvaged**

The *MELODY* was in no danger. She was in the open sea, far enough out to be in no danger of drifting ashore, and yet not so far but what she was within easy

reach of the Coast Guard's help. The weather was the finest. It was midsummer, with long hours of daylight. The breeze was gentle, the sea smooth, with an easy ground swell. It is true, she was capsized and more than half submerged. A strong play has been made by libelants to show that she was in immediate danger of sinking. This is extravagant. The danger is not proven by what they or anybody else may have *thought* at the time. The danger or lack of it is proven by the results. Now the plain facts are that she capsized at ten minutes to 1:00, lay awash in the sea until 4:00 P.M., or thereafter, when towing began, during which *three hours* she did not sink, and was then towed in to the Point Adams Station without any change in her condition, until she was finally beached at 12:30 A.M. the next morning. So that for a total of nearly *12 hours*,—from 12:50 P.M. to 12:30 A.M.,—she floated. If there is truth in the maxim that the “proof of the pudding is in the eating”, we surely have it here. A claim was made by libelants that the mere towing of her helped to keep her afloat. This is against all the laws of physics, except on the aqua-plane principle. But it is obvious that this water-logged boat, almost completely submerged, and being toward stern first, at perhaps one mile per hour, could not act on that principle. That she was not in any danger of sinking is, furthermore, attested by the only disinterested witnesses,—the men of the Coast Guard. Jensen said: “From the time you picked up the MELODY until the time you beached it were you at any time afraid the MELODY might sink? A. No; no, we were not. Q. Why weren't you? A. Well, being that she stayed afloat we knew there was no reason why she should

sink, unless we busted her up or something like that.” R. 269. And Shaw, Commander of the TRIUMPH, in a colloquy with the Court, said: “The Court: What about the two hours before you got there, when he had hold of her alone? A. Well, he had hold of her alone but there was very little progress made. The Court: Might she not have sunk? A. You say she may have sunk? The Court: I didn’t say that. I say, might she not have sunk? A. Well, she was afloat and it is my opinion that she would have stayed afloat for some time. The Court: For the two hours? A. Yes, sir.” R. 307.

In considering her floatability, it must be remembered that the MELODY was a wooden hull, and that she had 5<sup>2</sup> tons of ice, oil tanks and airpockets, all tending to maintain her buoyancy. But the best proof is that in 12 hours’ time she did not sink.

In considering what danger the salvaged property was in, the nearness of other aid is an important element, particularly the aid of the Coast Guard, whose special duty it is to act in these circumstances. The mouth of the Columbia River is well provided with an efficient Coast Guard service. Libellant Wuori has himself been towed in by them. R. 108. Stations are on both sides of the river,—one at Point Adams on the Oregon shore, and

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(NOTE 2) The Findings say 4. R. 22. There is not a shadow of evidence to support this, and it is only another instance of the Trial Judge’s signing, without sufficient scrutiny, Findings prepared and placed before him by libellants’ proctors. The only known FACT is that the MELODY on leaving Astoria had 6 tons of ice. R. 216. Rustad estimates that in the interval it had melted down to 5. R. 216. The only other estimate is Wuori’s. After he had first said “I could not say,” and after the most flagrant attempt of his proctor to put the word “four” in his mouth, he finally said that about “a thousand pounds” would have been used up. R. 77-79. This is  $\frac{1}{2}$  a ton. So according to Wuori, the remaining ice would have been 5 $\frac{1}{2}$  tons; and according to Rustad 5. Yet the Findings, simply because libellants’ proctor wrote them, say 4. It is perhaps not very important except to show the unreliability of the Findings.



one at Cape Disappointment on the Washington side. The MELODY, according to the Court's findings, was only 9 miles offshore. In short, she was within easy reach of these Coast Guard crews. A most important fact is that news that Rustad and his men were out there drifting on a life raft reached the Coast Guard *before Wuori's* message. We refer to the Navy patrol plane's radio to the Coast Guard Stations, which preceded Wuori's message by half an hour, and resulted in the crash boat going out. Of course when the crash boat got there and saw that it was not merely a human rescue, but that a towing job was also involved, they radiod in for boats equipped to tow, and the two lifeboats and the TRIUMPH arrived. So that libelants cannot even claim that, but for their radio message, help would not have arrived. The utmost that their radio message did was to start the towboats on their way out about one hour before they would otherwise have started.

Of course, once the Coast Guard boats were on the scene, they, with their better equipment, power and skill, did most of the towing.

Any analysis of the facts must convince the Court that if the STAMPEDE II had never appeared on the scene at all, the various towboats of the Coast Guard, in response to the crash boat's message, would have arrived on the scene at intervals between 6:00 and 7:00 P.M. in summer daylight, and would have towed the MELODY alone into safety. After their arrival the STAMPEDE contributed very little. In fact Shaw says that he, with the TRIUMPH, and Jensen, with the Point Adams boat, could have done just as well without her. R. 306.

How then can it be said that the MELODY was in any danger? Or that it was the STAMPEDE that saved her from danger?

We comment at this point on the Findings of "Fact". R. 20-28. These were prepared by libelants' counsel, and the Trial Judge, after a few minor changes and eliminations, signed them. The language is almost throughout, however, the language of libelants' counsel. These Findings of "Fact" contain many statements which are nothing more than conclusions, such, for example, as: "In this respect said vessel (MELODY) was kept afloat by the ice in her hold, airpockets within her hull and the fuel oil in her tanks, and upon the melting of said ice and the escaping of air from said pockets, and the loss of said oil from her fuel tanks, and the replacement thereof with water, said vessel would sink or likely to sink and become a total loss. So, at all times there was danger that said vessel MELODY might sink, and especially so if not kept under way." R. 24.

We do not need to point out to a Court of this experience that most of the foregoing is composed of mere conclusions. There was not the slightest evidence that the air did escape from the air pockets or any evidence at all that the oil did escape from the fuel tanks, and no reason at all to suppose that either the air or the oil would escape. And that the "vessel would sink or likely to sink and become a total loss" is obviously a mere conclusion. The same is true of the statement that "So, at all times there was danger that the said vessel MELODY might sink and especially so if not kept under way".



In respect to these matters, therefore, we are not faced with the rule that the Trial Judge's Findings of Fact on disputed evidence will not be disturbed unless clearly against the weight of it.

### **Danger to Salvors and Their Property**

What danger was there to the STAMPEDE II or any of her crew in a calm sea on a summer afternoon? There were none of those skillful acts of seamanship which in many salvage operations approach the heroic. There was no shooting of rocket-lines aboard; no edging in close to a dangerous lee shore; no encountering of shoals, rocks or treacherous currents; no passing a line to the wreck by some heroic seaman swimming to it through dangerous waters; no storm; no breakers; no danger of collision caused by heavy seas. No. All that happened was that the STAMPEDE II put her bow up against the MELODY and Syvanen jumped aboard the MELODY and tied a line around her rudder stock. An effort by libelants was made to show that in doing this Syvanen might have got entangled in some lines and been carried down if the MELODY had suddenly sunk. The testimony about the lines is suspicious, (Rustad says they were all secured, R. 248) but, granting its truth, there is no reason why a man, working without haste, in calm weather, should get entangled in them; and most certainly there was no danger of the MELODY taking any sudden plunge to the bottom. She was simply a water-logged vessel easily drifting, and if she had sunk at all, would have sunk gradually.

The same may be said about the claim that the STAMPEDE might have had her propeller fouled in lines that were hanging from the wreck. It certainly would have been most unskillful seamanship, even conceding the lines were there. Nosing her bow up against the wreck, her propeller would have been 50 feet away. And even if fouled, it is an easy job in a calm sea, in daylight, to put a man overboard to free it. And besides the Coast Guard was within call.

To say more on this would tax the Court's patience. There was no danger to Syvanen, or to the other libelants, or to the STAMPEDE II herself.

In fact the libelants concede that after they had made their line fast and started towing, there was no risk at all as long as they were outside in the open ocean. R. 101. But they contend that after they got near the jetties (this was after the Point Adams boat and the TRIUMPH had joined the tow), there was some danger of being set northward toward Peacock Spit. There was no such danger at all. The river's mouth for vessels of this draft is more than a mile wide. The tide was beginning to flood, at which time there is no current toward Peacock Spit.

The merits of a salvage claim depend in part on the skill shown by the salvors. The unskillfulness of these salvors is shown by the circumstances which surrounded the fouling of the TRIUMPH's line by the STAMPEDE II. This happened at 10:45 P.M., according to the notation in Shaw's book (R. 298), when the boats were at or inside the river entrance. R. 264, 89, 146. The three boats towing slightly fanwise were in this position: The

STAMPEDE II was in the middle. The TRIUMPH was on the starboard side, and the Point Adams boat in the same relative position on the port side. The STAMPEDE II, which had out a hundred fathoms of line, desired to shorten it. According to Wuori, this was because they were entering the channel, but according to the Coast Guard men, it was because his line was fouled on the bottom. Anyway, without any clear understanding, R. 289, with the two Coast Guard boats on either side of him, he reeled in his line, and in so doing, in spite of the TRIUMPH'S efforts to veer off and keep out of the way, he went over the TRIUMPH's line and fouled it in his propeller. From that time he was helpless. They cut him loose and the Cape Disappointment boat towed him into Point Adams while the other two boats brought in the MELODY. Does this sound like a skillful operation? One may well wonder how such blundering could have happened. The explanation, however, is found in libellant's own testimony. *Nobody remained at the STAMPEDE's wheel. Part of her crew were asleep and Wuori was trying to handle the boat alone.* We refer to this testimony of Wuori himself:—"So then we started to shortening our toelines. The TRIUMPH went from starboard to port. We were still going ahead continuously running. Q. Where were you at the time? Were you in the pilothouse? A. I was in the pilot house. Q. Were you at the wheel? A. I can't remember where I was. Yes, I was on the wheel. *I was alone there* at the time when I made the telephone call. *The boys were asleep.*" R. 71-72. And also this testimony: "Q. Was it your purpose to slow down just sufficient, to a speed sufficient to reel this line in without any particular pull

on it? A. Yes. Q. Was that the purpose? A. Yes. Q. All right. Now where were you at the time? A. I was at the wheel. Q. Who was at the winches, if anybody? A. John Kurtti was at the winches, and *then once in a while I came out on the main deck, too. There wasn't anybody on the wheel at the times*, but I got mechanical steering apparatus." R. 84. He then explains that with such apparatus you can set the vessel on a course and it will stay there.

Here we have the plainest evidence that in a maneuver admittedly requiring skillful seamanship,—i. e., taking in a towline at night in a river channel with two other towboats, one on each side,—Wuori attempted to do it without reaching a clear understanding with his companion towboats, and with half his crew asleep and only himself at the wheel, which he had to leave from time to time to superintend the reeling in of the line. If that was skill, entitling the salvor to a meritorious award, or to be paid for a cable which he lost as a consequence, then all we can say is that we are badly mistaken in the law.

On this subject of dangers encountered by salvors, we shall say no more, except that the whole operation was merely one of towage involving no more than the slight hazard which may be said to inhere in any towage operation. Certainly there was no risk in making fast to the MELODY, nor in towing her in the open sea, in calm weather, with Coast Guard boats alongside. And it would be a timid seaman, indeed, who would say that he would fear to enter the Columbia River's mouth, more than a mile wide, on a calm night, on a flood tide

floating him in.

The exaggerated claims of "danger" and "hazard" (often, by the way, put into the witnesses' mouths by leading questions), are on a par with their extravagant claims about the fishing they lost. Of course they could have gone on about their fishing as soon as the Coast Guard arrived, but they claim they lost "just about a week" (R. 118), or "a little better than one trip" (R. 119), and that the average "gross" value of one trip is "between \$2000 or \$3000" R. 119. What the "net" might be we do not know. The mystery of how the STAMPEDE, which suffered no damage at all, and was merely put on the beach next morning and freed of the line in her propeller, R. 75, could lose a week instead of proceeding at once to sea, is not satisfactorily explained. A weak attempt is made at R. 124, where Wuori claimed that it took "almost a week" to refuel and re-equip. This is not credible. A more satisfactory explanation is that Wuori, eager for the "insurance", spent that week with his attorney, Mr. Fulton. The libel was verified August 4th, R. 12, only ten days after these events. Obviously what fish the STAMPEDE might, or might not, have caught is purely speculative. The vagueness of all this and the willingness of the Trial Judge to sign whatever Findings of Fact libellants placed before him, on matters which he evidently regarded as not very important, are illustrated by the fact that although the libel itself, exaggerated as it was, only claimed for the loss of fishing "the sum of \$2000 to \$3000" (R. 10), and although libellant's testimony claimed no more, R. 119, the Findings of Fact say that libellants "lost a trip and



a half of bottom fishing, at a loss to them of from \$3000 to \$5000" (R. 27). This is evidently based on some later testimony of Wuori's at R. 198. Of course it is all a mere guess, and a conclusion. And why "a little better than one trip", which was Wuori's testimony at R. 119, was stretched to "a trip and a half" at R. 198, we do not know.

These matters are not important except as showing that extravagance which characterizes all of libellants' claims and the willingness of the Trial Judge to accept libellants' Findings of Fact without any close scrutiny.

## THE AWARD

The Court, valuing the salvaged property at \$17,500; allowed libellants \$300 for expenses; and in addition made a total salvage award, *including the services of the Coast Guard*, of \$6000. This is 34.2% of the net salvaged value; and in view of the nature of the services, and of the authorities which we shall submit in this brief, is high. Even for saving abandoned derelicts after heroic and dangerous efforts, the award is seldom more than 50%. So that \$6000 seems to us excessive. But certainly to award \$4000 of this to the libellants is to greatly over-rate their services and to underrate those of the Coast Guard. Of course the Coast Guard, since they were merely performing their duty, got nothing, and the Court used the \$6000 only as a method of arriving at a segregated portion thereof for libellants. But that portion, amounting to  $\frac{2}{3}$ , is all out of proportion. It elevates the services of Wuori et al., and deprecates those of the

## Coast Guard.

An analysis of these combined services shows that the total distance towed, from the point where the STAMPEDE first took hold to the Point Adams Station where the MELODY was beached, is about 20 miles, according to Wuori's testimony and his marks on the charts, and about  $18\frac{1}{2}$  miles according to our estimates, based on the Record generally. At all events the discrepancy is not great. These distances are measured along the courses the boats followed, as marked on the charts. If we accept the distance of 20 miles, as testified by Wuori, and as more favorable to him, an examination of the charts (Libelant's Exhibits 1 and 2) will show that from the X on Exhibit 1, which Wuori indicated as the original position of the MELODY, to the X, inside circle, marked by Jensen, as the position when he came up, and confirmed by Shaw R. 286, the distance is  $3\frac{1}{2}$  miles. This, though somewhat greater, we believe, than the actual fact, is the maximum distance the STAMPEDE towed alone. From this point to the "North Whistler" buoy, measured on the chart, is  $6\frac{1}{2}$  miles. This distance the 3 boats towed together. From here, rounding the buoy and proceeding into the river, they continued towing together to the place where the STAMPEDE fouled the TRIUMPH's line. This distance is a little less than 3 miles, according to the mark placed on Libelant's Exhibit 2 by Jensen, but a little farther, according to Wuori's mark. We accept Jensen's as the more accurate, and because it closely corresponds with the allegation in Wuori's own libel that the fouling occurred "at a point on the main channel range of the Columbia River, approxi-



mately abreast of the West end of both North and South Jetties." R. 25. The total distance thus towed by the 3 boats together was, therefore,  $6\frac{1}{2}$  plus 3, or  $9\frac{1}{2}$  miles. From this point, where the propeller fouled, to the Point Adams Station is 7 miles, measured along the channel course. This 7 miles the two Coast Guard boats towed alone; the STAMPEDE, helpless, being towed in by the Cape Disappointment boat.

It is quite obvious that on the basis of distance covered, the Coast Guard boats did most of the work. When we add the additional factor that they had more power than the STAMPEDE, the discrepancy becomes even greater.

Based upon the foregoing accurately measured distances, the respective services may, in fact, be proportioned with arithmetical precision thus:—

The STAMPEDE had 100 horsepower. Libel R. 7.  
The Point Adams boat had 75 horsepower. R. 257<sup>3</sup>.  
The TRIUMPH had 160 horsepower. Libel R. 7  
and R. 286.

The total horsepower employed was, therefore, 335.  
Of this the STAMPEDE furnished  $100/335$ ths.  
The total distance towed was 20 miles.

For the purpose of this computation we accept, as most favorable to libelants, a total distance towed of 20 miles, though, as a matter of fact, we think it was, at most, not over  $18\frac{1}{2}$ .

Likewise, for the purpose of this computation, we

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(NOTE 3) The libel says 100 horsepower. R. 7. If we accepted this figure it would be 25 horsepower to our advantage. But Jensen, Commander of the boat, says 75 horsepower, and as he should know, we give libelants the benefit of any doubt, and take the lower figure.

shall credit the STAMPEDE, as most favorable to her, with the first  $3\frac{1}{2}$  miles. In doing so, we give her the benefit of the doubt because, for the reasons already stated on Pages 4-5 of this Brief, we think 2 miles would be a very liberal allowance for her. But say,  $3\frac{1}{2}$  miles. The next  $6\frac{1}{2}$  miles the 3 boats towed together to the North Whistler buoy, and, rounding it, continued to tow together for not quite another 3 miles,—but say, 3 miles, making a total of  $9\frac{1}{2}$  miles, all 3 boats towing, to which mileage the STAMPEDE contributed 100/335ths of the horsepower. The contribution to this mileage was, therefore, 100/335ths of  $9\frac{1}{2}$  miles, which is 2.835 miles. There the STAMPEDE's services ended. Of the total 20 miles covered, therefore, she should be credited with only  $3\frac{1}{2}$  miles plus 2.835 miles or 6.335 miles. 6.335 miles is her portion of the 20. 6.335/20ths of the total award of \$6,000 should, therefore, be her portion of the award. 6.335/20ths of \$6000 is \$1900.50. Yet the Court gave her \$4,000. How can that be justified? Even \$1900.50 would be too much because, as stated already, \$6,000 is too much.

In the foregoing analysis the first  $3\frac{1}{2}$  miles have been credited to the STAMPEDE. We think it is too much. We believe 2 miles, for reasons already stated, would be generous. On this basis, and estimating the total distance covered at  $18\frac{1}{2}$  miles, and applying the principles above, the award to the STAMPEDE would be \$1568.10.

Your Honors will observe that in the foregoing analysis we have credited nothing to the crash boat, and nothing at all to the Cape Disappointment boat, al-

though in fairness something should be credited to the latter because she stood by all the way in, and eventually towed the helpless STAMPEDE the last 7 miles. But since we have made the computation only on the basis of miles which the MELODY was actually towed, we have left the Cape Disappointment boat out.

Substantially the same result will be reached if we compute the services on the basis of time, that is to say, on the basis of horsepower hours consumed. And in this computation we shall include, this time, the Cape Disappointment boat, because her time was actually given along with the other Coast Guard boats, and she actually performed the standby services and the eventual towing in of the STAMPEDE.

Computed on the basis of time, the services were as follows:—

The STAMPEDE sighted the MELODY at 2:30 P. M. R. 3, 21, 55-56. She reached Point Adams, along with the other boats, at 12:30 A.M. R. 269, 308. This was 10 hours' time.

The Point Adams boat left its station at 3:20 P.M. R. 257. The Cape Disappointment boat must have left her station at the same time because both were responding to the same radio message. The same is true of the TRIUMPH. She was on her way into the river from Tillamook Rock, and, receiving the message, instead of going in, went on to the MELODY. Therefore all these 3 Coast Guard boats began their services at about 3:20 P.M. For the sake of easy calculation, we put it 10 minutes later, and say that they did not begin their services

until 3:30 P.M. From 3:30 P.M. until 12:30 A.M., when all landed at Point Adams, is a period of 9 hours.

To sum up the foregoing, therefore, the STAMPEDE put in  $10^4$  hours' time; the 3 Coast Guard boats put in 9 hours' time.

The horsepower hours are calculated as follows:

For the STAMPEDE— $100 \times 10$ , or 1,000 horsepower hours;

For the TRIUMPH— $160 \times 9$ , or 1440 horsepower hours;

For the Point Adams boat,  $75 \times 9$ , or 675 horsepower hours;

For the Cape Disappointment boat,  $75 \times 9$ , or 675 horsepower hours.<sup>5</sup>

The total horsepower hours consumed, therefore, are 3790; of which 1,000 were consumed by the STAMPEDE and 2790 by the 3 Coast Guard boats.

1000/3790ths, therefore, should be the portion of the total award attributed on a time-basis to the STAMPEDE. Applying this rule, 1000/3790ths of \$6,000 is \$1,583.11. This is surprisingly close to the \$1,568.10 computed on a distance basis, *supra*, page 20.

Again we ask, how on any basis whatever can an award of \$4,000 to the STAMPEDE II be justified?

We have before adverted to the fact that little value can be given to Wuori's radio message to the Coast Guard. For the radio from the Navy planes had pre-

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(NOTE 4) This is generous, for it includes the period from 10:45 P.M. to 12:30 A.M.,— $1\frac{3}{4}$  hours—when the STAMPEDE did *nothing*, but, on the contrary, was herself being towed. Strictly she should receive no credit for this time, for her services had ended.

(NOTE 5) The Cape Disappointment boat and the Point Adams boat were the same, both 36 foot life boats. R. 257, 274.

ceded it.

And as for the STAMPEDE's alleged "services" in "standing by" after she fouled her wheel, she was, as a matter of fact, helpless (R. 291) and had herself to be towed in by the Cape Disappointment boat. R. 291. And why should there be any necessity of her "standing by" at all? When the Cape Disappointment boat was alongside with nothing to do but to perform that very standby service? "Ridiculous" is not too strong a word for these claims.

In conclusion, we say that on no basis whatever can an award of \$4,000 to the STAMPEDE be justified. Based on a total award of \$6,000, used as a measuring stick, it is all out of proportion, as we have shown, to the services performed. And the \$6,000 is itself too high, since it is 34.2% of the salvaged value for services which were only a little more than mere towage.

## AUTHORITIES

Unwarranted and extravagant demands of salvors, eager as these were from the start, "to build a case of salvage", will mitigate and sometimes even deprive them of an award. The PEJEPSCOT—JOHN AND FREDERICK, 1939 A.M.C. 316, 322; LEWIS BROTHERS, 287 Fed. 143, 145.

A salvaged vessel is not responsible for damage to salvaging vessel caused by fault of latter. (Hence, respondent here not liable for value of cable lost by Wuori if it was through his fault. THE JEAN SOMERVILLE, 1923 A.



M.C. 142; 286 F. 35.

Following are examples, mostly of fish boats, which approximate this case:

**THE QUODDY, 123 A.M.C. 997; 289 F. 132.**

Disabled fish boat towed in in 10 hours in fair weather. Total salved value \$4,434. Salvage "of a rather low order". Award \$175.

**THE LEWIS BROTHERS, 1923 A.M.C. 998; 287 F. 143.**

Schooner worth \$8000, with deckload of lumber worth \$14,000. Heavy weather. Deckload shifted. Small leak. Captain killed. Salvor worth \$1,000,000. Towed schooner 95 miles in 14 hours. In so doing lost 10 hours. Award \$500 to owners of steamer. No award to crew. no award to steamer's mate, who boarded schooner, because he grossly exaggerated his services.

**THE TRUXILLO, 1926 A.M.C. 172.**

Worth \$59,000. Was towed 10½ hours to place of safety. Weather gentle to moderate breeze with heavy swell. Value of salvor \$230,000. Salvor claimed loss of 24 hours due to navigating river at night and loss of stevedoring service through delayed berthing. Services of a "low order". Double towing rate allowed. Total award \$2840.

**THE PARISMINA, 1926 A.M.C. 673.**

The PARISMINA was broken down and drifting helplessly. Salvor towed her 180 miles into Havana. Each vessel worth \$300,000. Salvage of "very low order". Award \$200 per hour for towing; \$100 per hour for loss of time.

THE MARY PIGEON, 1927 A.M.C. 634; 17 F.  
(2d) 921 (CCA, 9th Circuit).

The MARY PIGEON, a fishing boat, had engine room flooded and engines out of commission, but was not helpless, as she could have, if weather held, used her sails to reach port. Accepted assistance of the INVINCIBLE, another fishing boat, which towed her 3½ hours for 12 miles to safety, and on the next day a further 50 miles to Turtle Bay, in 8 hours' time. Trial Judge awarded \$1700 for first towage, holding it to be salvage; \$80 for second towage, holding it to be mere towage. Conclusion of CCA was: "We think the salvage award should be reduced to \$500, and that the sum payable by appellant on final decree accordingly be reduced to \$278.80."

The reasons for this reduction were the gross exaggeration and the false claims of the salvors, in which respect we suggest the present case is analogous.

THE MARITIMA, 1929 A.M.C. 355.

The MARITIMA, a fishing boat with a fresh catch of fish aboard, broke main crank shaft and was helpless, except she could steady herself with her sails, but could make no steerageway. She was worth \$20,000. Two trawlers, worth, respectively, \$10,000 and \$14,000, towed her from 6:00 P.M. one day until following morning, a distance of 40 miles. Wind blew 25 to 35 miles per hour that evening, and no other boats in the immediate vicinity. Sea was rough and some danger. A towboat would have charged \$150 to go from Boston to the MARITIMA's position and tow her back. Judge Lowell said: "It seems to me, gentlemen, that there was a low degree of salvage performed in this case. On the other



hand, even double towage seems to me a little low. I should say that a fair figure was \$500, to be awarded equally to the masters and crews of the two vessels."

THE ISABEL Q., 1929 A.M.C. 489.

THE ISABEL Q., a fishing schooner, was broken down. Another schooner towed her 36 miles in 5 to 6 hours. Weather moderate. No cargo on board either schooner. Salvor was delayed in her fishing about 10 hours. Salvor worth \$20,000, salvee \$17,500. Salvee offered \$500. Lowell, District Judge, said: "This was a mere plain case of towage. There was not the slightest element of salvage in it. I think they were very foolish not to accept the offer. I award them \$300."

AUDREY-STAR, 1931 A.M.C. 1698.

The STAR, a fishing boat, worth \$7,000, was stranded on reef and in considerable danger. The AUDREY, after a number of attempts, pulled her off. "The service rendered was a salvage service though not of a high order". Award \$500 to owners and \$125 to crew. Total \$625.

COMMONWEALTH, 1932 A.M.C. 199.

The COMMONWEALTH, a wooden fishing boat worth \$12,000, stranded on Alaskan reef. EL HURD took off her crew and all loose gear. Returned next day and pulled wreck off reef and towed it to shore, but COMMONWEALTH dragged her anchors and stranded on a safe beach, from which EL HURD again pulled her afloat. HURD worth \$7,000. Awards by Judge Neterer were \$1200 to owner of HURD, \$300 to master.

**ROBIN—SERRA, 1932 A.M.C. 1476.**

SERRA, a wooden fishing boat, broke rudder off Farallones. ROBIN, another fishing boat, which abandoned large school of fish just located, came to her assistance. SERRA had no wireless or means of signals and ROBIN was only boat in vicinity. ROBIN towed SERRA to Oakland, 31 miles, in 5 to 6 hours, encountering some difficulties on way. SERRA in no immediate danger, but if not picked up her situation would have become serious. Value of SERRA \$24,400; value of ROBIN \$18,800. Award by Middleton, arbitrator, \$1100, including damages ROBIN sustained and loss of fish.

**BELLE ISLE—PATRIA—SAN SALVADORE,  
1934 A.M.C. 147.**

All three were tuna fishing boats. Salvor, BELLE ISLE, rendered slight services to other two and lost "greater part of a day's fishing". Claimed \$10,000 award against each boat. Salvees offered \$150 and \$200, respectively. Commissioner awarded these latter amounts and was confirmed by Court.

**JAPONICA, 1935 A.M.C. 480.**

Ten percent, or \$400, was awarded for towing a large motor passenger boat worth \$4,000, with engine bearings burned out, for 12 hours to a place of safety, and then notifying the Coast Guard who completed the salvage. The salvor was a small motor boat worth \$400.

**PEJEPSCOT—JOHN AND FREDERICK, 1939  
A.M.C. 316.**

This case already cited above. The tug PEJEPSCOT and tow, together worth \$40,000, stranded. Two small

tugs assisted in pulling them off. No particular danger. Coast Guard was at hand. Total award to one tug \$832.50, and to the other \$806.25.

NORTH STAR—FRIGIDLAND, 1940 A.M.C.  
1017.

This case resembles the present. Both were fishing vessels. The FRIGIDLAND, salvee, was capsized. Worth \$26,000; net salved value \$15,000. Salvor worth \$40,000. Services were: responding to salvee's call for help, sending radio message to Coast Guard, putting line aboard salvee and standing by for 5 or 6 hours keeping spotlight on her until Coast Guard arrived, and then taking crew into San Francisco. Award by arbitrator, E. E. Williams, \$100 for "slight" salvage services, and \$101.86 loss of fishing, based on average catch of other boats same night, total \$201.86.

## FORM OF DECREE IS WRONG—ASSIGNMENT OF ERROR X

The decree is against the MELODY and respondent Rustad "*and his stipulator Fidelity and Deposit Company of Maryland*", and decrees recovery from them of \$4300 and directs "that execution issue therefor". R. 29, 30.

It is erroneous and against well-established admiralty practice to issue a decree against the stipulator in this form. The stipulator's stipulation is "conditioned that the claimant above named shall abide by and pay the money awarded by the final decree", etc. R. 14. This is the usual form. No decree should ever issue against a stipulator until the claimant has first been given a chance to "abide by and pay the money awarded by the final decree". It is not until the claimant fails in that obligation that the stipulator is called upon to do anything. Of course the stipulator's stipulation has nothing whatever to do with the suit in personam against Rustad; it has only to do with the suit in rem against the MELODY. The usual form in such a case is for the decree to run in the first instance against the claimant only, and then to provide that a certain time shall be given to the stipulator to "perform the engagements of his stipulation". If he does not do so, then a supplementary decree issues against him. But it is wrong, as was done in this case, to make the decree run against the stipulator in the first instance. The error was pointed out to the Trial Court but he disregarded it.

## CONCLUSION

We ask that this Court weigh the reasons advanced in this brief for reducing the amount of the award, and then order that a decree be entered in proper form for such amount as to this Court seems just.

Respectfully submitted,

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## APPENDIX

### ASSIGNMENTS OF ERROR

The trial court erred in the following particulars:

#### I.

In holding in effect, that the appellees rendered salvage services of a high order, entitling them to the awards made in the decree, instead of holding that the services were in the nature of towage, or at most salvage of a low order.

#### II.

In holding, in effect, that the *Melody* was in serious danger and might sink, and that "but for the assistance so rendered by the libelants," she was likely "to have been entirely and wholly lost." This holding is especially erroneous because it ignores the presence of the Coast Guard, which was on the scene almost from the beginning, and in fact performed most of the towing.

#### III.

In holding that the appellees incurred danger to their persons and property; and in not holding that, on the contrary, there were no unusual risks occurred at all; nothing beyond an ordinary towing operation. [27]

#### IV.

In holding that appellee Syvanen boarded the *Melody* "at risk of his life and person."

#### V.

In holding that the *Stampede II*, after she fouled her wheel in the *Triumph's* line, stood by, and was ready



and able to perform further services if needed; and in not holding that, on the contrary, she was, from this time on, disabled, and useless, and had to be towed in herself by the Coast Guard.

#### VI.

In holding that the value of the Melody, prior to the service, was \$25,000, and after it, \$17,000.

#### VII.

In holding that appellees lost \$3000 to \$5000 worth of fishing.

#### VIII.

In holding that the services rendered by appellees and the Coast Guard were, together, worth \$6000, and in apportioning two-thirds of this to appellees.

#### IX.

In entering its decree awarding \$4300 to appellees, apportioned as in said decree.

#### X.

In summarily including in said decree the stipulator Fidelity & Deposit Company of Maryland, without first giving it, in accord with admiralty practice, an opportunity to perform the engagement of its stipulation.



## CORRECTIONS IN APOSTLES

We notice the following rather obvious errors in the Apostles:

On page 108, lines 17 and 25 the word "selfish" should be "salvage".

On page 262, line 20, the word "make" should be "take".

On page 293, line 21, the word "school" should be "spool".

On page 307, line 8, the word "we" should be "he".

On page 331, line 13, the word "station" should be "situation".

